MALAYSIAN REPORTS

KUALA LUMPUR MUTUAL FUND BERHAD v. J. BASTIAN LEO & ANOR.

[S.C. (Wan Suleiman, Hashim Yeop A. Sani & Wan Hamzah S.C.JJ.) 28 March 1987 & 25 June 1988]

[Kuala Lumpur – Supreme Court Civil Appeal No. 18 of 1986]

Labour Law – Alleged employment as representative of company – Whether person a "workman" within the meaning of section 20(1) of the Industrial Relations Act 1967 – Right of control test – Industrial Relations Act 1967, ss. 2 & 20.

The respondent in this case alleged that he was employed by the appellant as a representative. He complained that the appellant failed to confirm his promotion to the post of supervisor and later failed to promote him to the position of acting agency manager and agency manager. He also complained that he was transferred to appointments which were inferior to the terms and conditions he enjoyed as a supervisor. He considered therefore that the appellant had wrongfully repudiated his contract of employment and contended that what had taken place was in law a constructive dismissal. The matter was referred to the Industrial Court, which held that the respondent was not a "workman" as defined in section 2 of the Industrial Relations Act 1967. The claim by the respondent was therefore dismissed.

The respondent applied for an order of certiorari and mandamus to the High Court. The learned judge of the High Court held that the Industrial Court had erred in its finding and therefore quashed the award and directed it to hear the reference on the merits. The appellant appealed.

Held, allowing the appeal: There was no evidence in this case of the power of control over the manner of doing work, which still remains the most important indicia of a contract of service, and therefore the court agreed with the finding of the Industrial Court that the respondent was not a "workman" within the meaning of the Industrial Relations Act 1967.

Cases referred to:

(1) *Australian Mutual Provident Fund Society* v. *Chaplin & Anor.* 18 A.L.R. 385 (folld).
(2) *Commissioner of Pay-Roll Tax* v. *Mary Kay Cosmetics Pty. Ltd.* (1982) V.R. 871 (folld).
(3) *Australian Mutual Provident Society* v. *Allan* (1977) 16 S.A.S.R. 237 (refd).
(4) *Australian Mutual Provident Society* v. *Allan* 52 A.L.I.R. 407 (refd).
(5) *Narich Pty. Ltd.* v. *Commissioner of Payroll Tax (N.S.W.)* (1982) 12 A.T.R. 478 (refd).
(6) *Federal Commissioner of Taxation* v. *Barret* (1973) 129 C.L.R. 395 (refd).
(7) *E.P.F. Board* v. *M.S. Ally & Co. Ltd.* [1975] 2 M.L.J. 89 (refd).
(8) *Bank Voor Handel En Scheepvaart N.V.* v. *Slatford* [1953] 1 Q.B. 248 (refd).
(9) *Stevenson Jordan & Harrison Ltd.* v. *MacDonald & Evans* [1952] 1 T.L.R. 101 (refd).

SUPREME COURT.

S. Kulasegaran (*S. Navaratnam (Miss)* with him) for the appellant.

C. V. Das (*M. Nagarajah* with him) for the respondent.

Cur. Adv. Vult.

Wan Suleiman S.C.J. (delivering the judgment of the court): In his statement of case, the respondent Joe Bastian Leo alleged that the appellant, Kuala Lumpur Mutual Fund Berhad, had employed him as a representative on 3 January 1983.

In April 1983, the respondent was promoted to the position of supervisor subject to confirmation on achieving the required conditions, but he alleged that he was not confirmed after he had achieved the conditions required.

He further alleged that the appellant had interfered with his recruitment of sales representatives and transferred two of his representatives without sufficiently compensating him.

He then went on to allege that the appellant failed to promote him to the position of acting agency manager, and agency manager when he did qualify for such promotions after having successfully met the minimum quota required by the appellant company. Subsequent to March 1984 he was transferred to one appointment and then to another, both of which, he claimed, were inferior to the terms and conditions he enjoyed as a supervisor.

He therefore considered that the appellant had wrongfully repudiated his contract of employment and though he had resigned with effect from 31 August 1984, his contention was that what had taken place was in law a constructive dismissal.

A reference was made under section 20(3) of the Industrial Relations Act 1967 arising out of such constructive dismissal. On its coming up for hearing, counsel for the appellant raised a preliminary objection to the effect that the respondent was not a "workman" within the meaning of section 20(1) of the Act.

After considering the evidence presented as well as the submissions advanced by both sides, the Industrial Court held that the respondent was not a workman as defined in section 2, and accordingly held that since it had no jurisdiction to proceed, the claim by the respondent failed.

The respondent then applied for an order of certiorari and mandamus to the High Court. After hearing his application, the judge held that the Industrial Court had erred in its finding, and therefore quashed the award and directed it to hear the reference under section 20(3) on the merits.

This appeal is against that order of the High Court.

Is the respondent a "workman" within the meaning of that term in section 20(1) of the Act? Under the Act a "workman" is defined as any person employed by an employer under a contract of employment to work for hire or reward.

Before the Industrial Court, the appellant company gave four grounds in their statement of reply to support their contention that he was not a "workman", *viz:*

(a) he was not paid a fixed remuneration but merely an allowance or minimum guarantee commission;

(b) no E.P.F. contributions were made by the appellant company;

(c) the respondent had no fixed hours of work; and

(d) the appellant had no control over him as to the manner in which he did his work.

The Industrial Court applied the right of control test and its analysis of the facts is set out hereunder :

"The counsel for the claimant in his submission at the end of the inquiry submitted that the claimant had to go through the initial training, to be punctual at the meeting, to attend the sales and supervisory meetings, and the company had the right to discipline the claimant, and even there was control of telephone usage. But the claimant under cross-examination admitted that the company did not allocate specific clients to him, he was not designated to special areas for sales and he worked independently of the company as to the nature of his job.

The counsel for the claimant also laid stress on paragraph 8 of the letter of appointment where the word 'salary' has been used in the event of termination. But this paragraph is repudiated by the fact that the claimant, according to his own evidence, did not receive any salary for the first three months (*i.e.* from January to March 1983) after he joined the company, except that he only received a fixed allowance in the sum of $450 per month. The income tax returns state only the gross commission and it was not the salary of the claimant. In the audited accounts of the company by the accountants there is an item of 'overriding commission' and under another heading, there is an entry of 'sales travelling allowance' and there is no entry or item in respect of salary.

If there were an employer-employee relationship, as claimed by the claimant, the company as well as the claimant, by statute shall be liable to make contributions to the EPF and section 7(1) of the Employees Provident Fund Ordinance 1951 reads:

'7.(1) Subject to the provisions of section 16 of this Ordinance, every employee and every employer of a person who is an employee within the meaning of this Ordinance shall be liable to pay monthly contributions at the rate set out in the Third Schedule of this Ordinance.'

The managing director in his testimony stated that he did not make EPF contributions for the claimant, and this is corroborated by the other witness, who was a sales representative and who did not make any contributions to the EPF. The claimant also stated that he did not pay any EPF contribution. By this fact there is no employer-employee relationship existing between the company and the claimant."

Mr. Kulasegaran for the appellant company concedes that the right of control test is still the proper test. We were referred to the Privy Council decision in *Australian Mutual Provident Fund Society* v. *Chaplin & Anor.*[1]

There, in 1967 the appellant appointed the respondent as one of its representatives, upon terms set out in a detailed written agreement. Clause 3 of the agreement stated: "The relationship between the society and [the respondent] is that of principal and agent and not that of master and servant."

The respondent later claimed that he was entitled to benefits under the Long Service Leave Act 1967 (SA), because he was a "worker" as defined in the Act. That definition in section 3 said: " 'worker' means a person employed under a contract of service and includes a person so employed who is remunerated wholly or partly by commission." When the Full Court of the Supreme Court of South Australia held that the respondent was employed under a contract of service, the appellant appealed to the Privy Council. It was held, *inter alia,* in allowing the appeal, that the possession by an alleged employer of the power to control the manner of doing the work was a very important indication of a contract of service, perhaps the most important of such indicia.

Referring next to the letter appointing the respondent as the appellant company's representative, he argues that it shows the appoint-

ment of a commission agent and not a worker. Clause 3 thereof mentions payment of an "overriding commission" of sales by the respondent's "direct agents", and other agents. In addition the respondent, as supervisor, may recruit agents.

Clause 7 of the same letter of appointment, he submits, is another indicator – the requirement to sign a guarantee bond.

Alluding to the test apparently found acceptable to the High Court, the "part and parcel of the organization test" or the "integration test", counsel contends that this test applies in limited circumstances only. He submits that there are striking similarities between this and the Australian case of *Commissioner of Pay-Roll Tax* v. *Mary Kay Cosmetics Pty. Ltd.*,[2] a decision of the Full Court of the Supreme Court of Victoria.

There, a retailer of cosmetics sold its products through a "party plan system" by which beauty consultants engaged by it solicited orders from customers at "beauty shows". Each of the consultants was engaged under an agreement which typically provided "that the [consultant] is an independent contractor and not an employee of the company and is not for any purpose to be regarded as such" and "that this document constitutes the entire agreement between the company and the consultant". The consultants were provided with a manual which contained suggestions as to how they might conduct their selling operations, but the agreement did not oblige the consultant to comply with any of the suggestions in the manual. They were remunerated by way of commission.

The Commissioner of Payroll Tax assessed the retailer for payroll tax in respect of commissions paid to the consultants as being "wages" within the meaning of the Payroll Tax Act 1971, that is, as being payable to "an employee as such". An appeal by the retailer against those assessments was allowed by Tadgell J. and the Commissioner then appealed to the Full Court.

Held: (1) The degree of control exercised by one person over another is always a relevant consideration in determining whether a contract of service exists between them. This was the appropriate test in the present case. *Australian Mutual Provident Society* v. *Allan.*[3] at p. 247, *dictum* of Bray J. applied.

(2) The circumstances of the case gave no reason to look behind the status assigned to a consultant by the agreement which was the best evidence of the relationship between the parties. *Australian Mutual Provident Society* v. *Allan*[4] applied.

(3) The consultants were subject to very little control by the retailer in the relevant sense. It achieved no significant control over them by means of the manual, which was not required to be complied with, and which simply restated the requirements of the general law or of the agreement itself and was otherwise in the nature of advice. *Narich Pty. Ltd.* v. *Commissioner of Payroll Tax (N.S.W.)*[5] and *Federal Commissioner of Taxation* v. *Barrett*,[6] distinguished.

(4) Accordingly, the commissions paid to the consultants were not paid to employees as such, payroll tax was not assessable thereon and the appeal would be dismissed.

We were also referred to a passage on pp. 878 and 879 which is set out thereunder:

"The one principle which is clearly established is that the degree of control exercised by one person over another is always a relevant consideration in determining whether a contract of service exists between them. Although the sole test of control has proved inadequate in some classes of cases, *e.g. Zuijs* v. *Wirth Bros. Pty. Ltd.* (1955) 93 C.L.R. 561, it has always been accepted as a factor, in some degree, in all cases where the present question arises.

Recent years have seen the emergence of the 'integration test', where the question whether a person is an employee is measured by reference to the extent that his activities form an integral part of his master's business operation: see *Hailey* v. *Victorian Soccer Federation* (1976) V.R. 13, per Gillard J. at pp. 33-34 and the cases there referred to.

The limitations of this test were referred to by Stephen J. in *Federal Commissioner of Taxation* v. *Barrett* (1973) 129 C.L.R. 395 at 402; 2 A.L.R. 65 and in my opinion it is not a helpful test in a case such as the present. In one sense, the beauty consultants are an integral part of the respondent's organization because it is entirely reliant upon them to sell its products. In another sense, the beauty consultants, being part-time workers who can work as much or as little as they please, are anything but an integral part of the respondent's undertaking. The integration test may be useful in forming a judgment about a person said to be an employee of, say, a public hospital or like institution. But, in my opinion, it throws no light on the present problem.

When *Allan's* case, *supra*, was before the Supreme Court of South Australia (1977) 16 S.A.S.R. 237, Bray C.J., after stating that the test of control was no longer decisive, said, at p. 247: 'It seems to me, that at the present time there is no magic touchstone. The court has to look at a number of indicia and then make up its mind into which category the instant case should be put. It is a question of balancing the indicia pro and con. ... But the power of control over the

manner of doing the work is very important, perhaps the most important of such indicia.'

Those views were adopted by the Judicial Committee when the case went on appeal and were adopted by the learned trial judge on this case. I would respectfully agree that the test stated is one which is appropriate to this case."

Mr. Das for the respondent relied largely on the test as set out in the number of leading English authorities considered in the Federal Court decision in *E.P.F. Board* v. *M.S. Ally & Co. Ltd.*[7]

The Federal Court had there indicated that the traditional control test, based on the simpler socio-economic conditions of the by-gone days, must be modified if it is to be valid. There, reference was made to what Denning L.J. had said about the desirability in the present day to apply the "part and parcel test" in preference to the "right of control test" in *Bank Voor Handel En Scheepvaart N.V.* v. *Slatford*[8] (at p. 295) and in *Stevenson Jordan & Harrison Ltd.* v. *MacDonald & Evans*[9] (at p. 111).

However, as we have indicated earlier, we would prefer in the circumstances of this appeal to apply the test set out in the passage from the *Commissioner of Pay-Roll Tax* v. *Mary Kay Cosmetics Pty. Ltd.*[2]

Let us now consider and analyse the evidence. The letter of appointment as Mutual Fund representative would naturally be the point at which to commence our enquiry. Mr. Kulasegaran submits that when read as a whole it would show that the respondent was a commission agent and not a workman.

Because of its importance, we set out the letter in full hereunder:

"Kuala Lumpur
Mutual Fund Berhad

Date: 3 January 1983.

Your Ref:

In Reply Please Quote.

Mr Joe Bastian Leo
162, Jalan 1 Kiaw 3
Taman Goodwood
KLANG

Dear Mr. Joe Bastian,

Re: Appointment as Mutual Fund Representative

We are pleased to appoint you as our Mutual Fund representative with effect from 3 January 1983 under the following terms and conditions:

(1) A monthly allowance of $300 will be paid to you to cover all your allowance and expenses. This allowance will be reviewed after you have completed three months of service.

(2) On the instalment plan, you will be paid a commission of 1.5% on your gross sales for the first year and a renewal commission of 1.0% and 0.5% for the second and third year respectively. The second and third year renewal commissions are subject to your collections of the fund-holders' remittances of the second and third year initial payments respectively. On the cash plan, you will be paid a commission of 1.5% on the cash collected. However, the commission schemes are subject to alterations.

(3) You will also be paid an overriding commission of 0.2% on the gross sales of your direct agents and 0.05% of all other agents down the line.

(4) You are expected to meet the average gross sales quota of $30,000 monthly during the first three months with not less than a mininum of $15,000 in any particular month. Subsequently, you will be expected to meet a minimum gross sales quota of $50,000 per month.

(5) Daily reports and weekly reports are to be submitted regularly. The monthly allowance will be withdrawn if you fail to comply with this requirement.

(6) You are required to attend the weekly or any other meetings as directed by our company.

(7) You are required to have the guarantee bond completed, signed and returned to our company.

(8) Termination of service by either party during the first three months will be 24 hours' notice without having to assign any reasons. Thereafter, termination of service by either party will be one month's notice or *one month's salary in lieu thereof.*

If the terms and conditions are acceptable to you, kindly sign on the duplicate and return it to us immediately.

Yours faithfully,

Soh Teck Toh
Managing Director."

Clause 3 refers to an overriding commission and clause 7 is a requirement of a guarantee bond.

The fact that E.P.F. contributions were not made by the appellant company is inconclusive. Only the finding by a competent court of law that the appellant was or was not liable to make such contributions would bear any weight.

We have gone over the evidence recorded by the Industrial Court from Soh Teck Toh, the general manager of the appellant company, Lim Kong Yee, another representative who was appointed on the same terms as the respondent, and the respondent himself.

We are satisfied on the evidence before us that there was no evidence of the power of control over the manner of doing work, which, as we have said earlier, still remains the most important indicia of a contract of service, and therefore agree with the finding of the Industrial Court that the respondent is not a "workman" within the meaning of the Industrial Relations Act.

The appeal is accordingly allowed with costs, and the order of the High Court is set aside. The deposit made by the appellant should be refunded.

Appeal allowed.

Solicitors: *Ranjit Thomas & Kula; Shook Lin & Bok.*

PUBLIC PROSECUTOR v. PONTIAN BAS BERHAD

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Wan Hamzah S.C.JJ.) 12 October 1987 & 25 June 1988]

[Kuala Lumpur – Supreme Court Criminal Application No. 20 of 1987]

Provident Fund – Order of court for payment of arrears – Whether order can be enforced by imposition of imprisonment – Criminal Procedure Code (F.M.S. Cap. 6), s. 283(i)(b)(4) – Employees Provident Fund Act 1951, ss. 16A(1) & 16A(4).

In this case, the respondent had been charged in the magistrate's court for an offence under section 16A(1)(c) of the Employees Provident Fund Act 1951 ("the Act") for failing as an employer to remit contributions of four employees. The manager of the respondent company, who was present in court, pleaded guilty and a fine totalling $4,320 was imposed. This fine was paid. The magistrate also made an order under section 16A(4) of the Act for the respondent company to pay the arrears of contributions to the Employees Provident Fund Board amounting to $28,325. The respondent company failed to pay the arrears. The learned magistrate subsequently acting under section 16A(4) of the Act committed the manger to ten months' imprisonment for default of payment of such arrears. The respondent appealed to the High Court, Johore Bahru and the learned judge of the High Court allowed the appeal and set aside the order of committal by the learned magistrate [see [1987] 2 M.L.J. 646]. The Public Prosecutor then applied for the following question of law to be referred to the Supreme Court:

"Whether the learned judge was right in law in holding that section 283(i)(b)(4) of the Criminal Procedure Code (F.M.S. Cap. 6) can have no application in the enforcement of an order made by the court for payment of arrears of contribution pursuant to section 16A(4) of the Employees Provident Fund Act 1951."

Held: (1) section 16A(4) states in clear terms that the arrears of contribution "shall be recoverable in the same manner as a fine". In short, for purposes of recovery, arrears of contribution are to be treated in the same manner as any fine imposed as punishment for a particular offence;

(2) as the respondent firm has been wound up by a High Court order, no consequential order or alternative order for the recovery of the arrears will be made.

Cases referred to:

(1) *Lee Mun Foong* v. *Public Prosecutor* [1976] 2 M.L.J. 16 (folld).

(2) *Pontian Bas Berhad* v. *Public Prosecutor* [1987] 2 M.L.J. 646 (refd).

SUPREME COURT.

Ng Aik Guan (Deputy Public Prosecutor) for the applicant.

Philip Nainan for the respondent.

Cur. Adv. Vult.

Wan Suleiman S.C.J. (delivering the judgment of the court): This is an application made by the Public Prosecutor under section 66 of the Courts of Judicature Act 1964. Pontian Bas Berhad, the respondent, was charged in the magistrate's court for an offence under section 16A(1)(c) of the Employees Provident Fund Act 1951 on 24 counts of failing as an employer to remit contributions of four employees.

The manager of the respondent company, who was present, pleaded guilty to all the charges and a fine totalling $4,320 was thereupon imposed. This fine was paid. Upon the application of the prosecuting officer, the magistrate also made an order under section 16A(4) of the Act for the respondent company to pay the arrears of contributions to the Board which was certified by the accountant of the Board to amount to $28,325. Although a grace period of two months was allowed, the respondent company failed to pay such arrears.

On 18 October 1986, the learned magistrate acting under section 16A(4) of the Act, which specifies that contributions "shall be recoverable in the same manner as a fine", then committed the manager to ten months' imprisonment for default of payment of such arrears. He imposed this sentence by invoking section 283(i)(b)(4) of the Criminal Procedure Code.

The respondent appealed to the High Court, Johore Bahru against this decision of the learned magistrate. The learned judge allowed the appeal